

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**ON APPEAL FROM THE COURT OF APPEALS
Patrick M. Meter, PJ, Mark J. Cavanagh, Jessica R. Cooper, JJ.**

**THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,**

No. 123992

vs.

**DENNIS L. NICKENS,
Defendant-Appellee.**

**Lower Court No. 00-013258-01
COA No. 237794**

APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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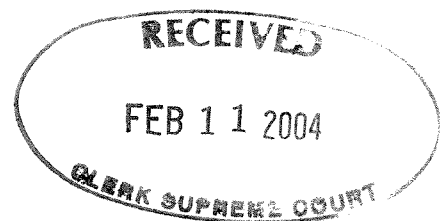


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Statement of the Questions

I.

An offense is an a "degree of" a charged offense "inferior to that charged" when its elements are a subset of the elements of the charged offense. Properly understood, are the elements of assault with intent to commit criminal sexual conduct involving penetration a subset of the crime of criminal sexual conduct in the first degree charging force or coercion and personal injury?

The People answer: "YES"

II.

An accused is entitled to fair notice to defend against charges. Even if assault with intent to commit criminal sexual conduct involving penetration is not a subset of the elements of CSC 1 as charged here, and even if *Cornell* is retroactive to instructions that were authorized by then-existing case law, did the defendant receive fair notice to defend so that no prejudicial error occurred?

The People answer: "YES"

Statement of Facts

The facts are well summarized by the Court of Appeals, and that summary is included here for the sake of convenience:

Defendant's conviction arises from allegations that he sexually assaulted his former girlfriend. The complainant and defendant dated intermittently for several years and had two children. At some point, the complainant began dating another man named Frank. According to the complainant, defendant did not accept this new relationship. When the complainant ultimately ended her relationship with Frank in August 2000, she discussed the possibility of reconciling with defendant.

On September 9, 2000, at approximately 4:30 a.m., the complainant claimed that Frank unexpectedly came to her home and stayed for half an hour. According to the complainant, defendant called during this time and "exchanged some words" with Frank over the telephone. Later that day, the complainant stated that defendant visited her house. The complainant testified that defendant asked her to kiss him and when she refused, he became violent. She claimed that defendant straddled her, tore her clothes, and pulled down her pants. Throughout his assault, the complainant asserted that defendant accused her of being intimate with Frank, called her derogatory names, and punched her repeatedly in the head. The complainant indicated that defendant subsequently dragged her into her bedroom, pushed her over a chair, and punched her in the stomach. Defendant then told her to stand up, pushed her backwards, and said, "[s]uck my [penis], bit--." The complainant claimed that when she attempted to stand up, defendant punched her in the stomach again and caused her to regurgitate. Defendant ultimately pulled her head up, placed his penis on the side of her mouth, and ejaculated "all over" her. As a result of defendant's actions, the complainant stated that she suffered a blood clot in her stomach, bruising on her chest and left eye, and a swollen left cheek.

On September 14th, the complainant reported the sexual assault to the police. She later obtained a personal protection order against defendant. On appeal, defendant argues that the trial court erroneously instructed the jury on the cognate lesser included offenses of assault with intent to commit CSC involving penetration and aggravated assault. We agree.

3a.

Rehearing was denied on May 27, 2003. This Court granted leave to appeal.

Argument

I.

An offense is an a "degree of" a charged offense "inferior to that charged" when its elements are a subset of the elements of the charged offense. Properly understood, the elements of assault with intent to commit criminal sexual conduct involving penetration are a subset of the crime of criminal sexual conduct in the first degree charging force or coercion and personal injury.

Standard of Review

Whether assault with intent to commit criminal sexual conduct involving penetration is an offense included within criminal sexual conduct in the first degree charging the use of force and coercion and personal injury to the victim is a question of law, reviewed de novo.¹

Discussion

Defendant was convicted of assault with intent to commit criminal sexual conduct involving penetration in violation of MCL 750.520g(1). The jury was instructed on this offense, the charged offense being criminal sexual conduct in the 1st degree, by way of force or coercion and personal injury.²

The Court of Appeals reversed on this line of reasoning:

- *People v Cornell*³ holds that the only sort of included offense that exists is that which formerly was referred to as a "necessarily"- included offense—one

¹ *People v Carpentier*, 446 Mich 19 (1994); *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80 (1991). Though the objection of defense counsel to the "included and not included offenses" is at best ambiguous, the People do not here claim that the issue is unpreserved for review.

² MCL 750.520b(1)(f).

³ 466 Mich 335 (2002).

where the elements of the lesser offense are a subset of the elements of the greater offense.

- *Cornell* states that its holding applies to cases pending at the time of its decision with the issue properly preserved.
- Assault with intent to commit criminal sexual conduct involving penetration is what was formerly known as a "cognate"-included offense of criminal sexual conduct in the 1st degree, not a subset of the elements of that offense, because it requires a showing of an "improper sexual purpose or intent."
- The trial judge thus erred—retroactively—in instructing on assault with intent to commit criminal sexual conduct involving penetration.
- The error was not harmless because defendant was convicted on the assault charge rather than criminal sexual conduct in the 1st degree.⁴

This analysis is mistaken because it rests on a false premise—that assault with intent to commit criminal sexual conduct involving penetration requires proof of an "improper sexual purpose." When the elements of this offense are properly understood it is revealed as an included offense of the type described by *Cornell* of the offense of criminal sexual conduct in the 1st degree, where that offense is charged under a theory of force or coercion (and here, personal injury).

It is important to begin with the statute, for the lesser-included offense question is governed by *statute*, MCL 768.32(1), something that was forgotten for 28 years:

...upon an indictment/(information) for an offense, *consisting of different degrees*, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of *that* offense *inferior to that charged* in the indictment/(information), or of an attempt to commit that offense

⁴ Judge Meter dissented, noting that 1)the conclusion that assault with intent to commit criminal sexual conduct involving penetration is not an included offense under the subset analysis of *Cornell* is "arguable," and concluding that 2)harmless error analysis is applicable to "*Cornell* error" and the "error" here did not undermine the reliability of the outcome. See slip opinion, dissent, at 1-2, and fn3.

Long ago this court held that limiting the statute to offenses *formally* divided by the legislature into degrees would essentially have limited the statute's applicability to murder in the first degree and murder in the second degree at that time, leaving it with "no purpose of object." The court found instead that the statute extends to "all cases in which the statute has substantially, or in effect, recognized and provided for the punishment of different offenses of different grades, or degrees of enormity, wherever the charge of the higher grade *includes a charge for the less*."⁵ This court has now returned to the principle that it may identify an offense as included within and inferior to the charged offense whenever the lesser offense is a subset of the elements of the greater offense.⁶

Generally, application of the subset of elements test is straightforward, but, because of varying use of terminology by the legislature, on occasion the question will be more complex. This is such a case. The mistake of the Court of Appeals in describing the elements of assault with intent to commit criminal sexual conduct involving penetration is understandable; the court defined the offense as:

(1)an assault;

(2)with an improper sexual purpose or intent;

⁵ *Hanna v People*, 19 Mich 315, 321 (1869).

⁶ The People believe it important to remember that *Cornell* is a statutory construction case, its rule designed for determining when an offense that *is not* formally divided into degrees contains offenses that are a degree of *that* offense but inferior to it. And the subset analysis provides the test. But when the legislature *has* formally divided an offense into degrees, as it now has with criminal sexual conduct, home invasion, and the like, then by legislative definition the offense is one "consisting of different degrees" and the *Cornell* test is unnecessary. Thus, CSC 2 is an included offense of CSC 1 without regard to whether it meets the subset of elements test, because the legislature has formally divided the offense of criminal sexual conduct into degrees. But whether an assault with intent to sexually penetrate is included within CSC 1 requires application of the *Cornell* test.

(3)an intent to commit an act involving penetration; and

(4) an aggravating circumstance.⁷

This description of the elements is drawn from case decisions,⁸ and consistent in part with the CJI2d instructions.⁹ But two of the elements described by the court—an improper sexual purpose or intent, and an aggravating circumstance—are not elements at all, and the former is not included in the CJI2d instructions, though the latter is, and mistakenly so. The elements of the offense as often described in case decisions cannot be derived from the text of the statute, and are an amalgam of elements of criminal sexual conduct in the 1st degree and criminal sexual conduct in the 2nd degree. This is not the correct way to view the statute.

The statute reads:

(1) Assault with intent to commit criminal sexual conduct *involving sexual penetration* shall be a felony punishable by imprisonment for not more than 10 years.

(2) Assault with intent to commit criminal sexual conduct *in the second degree* is a felony punishable by imprisonment for not more than 5 years.

Though paragraph (2) of the statute speaks of assaults with intent to commit criminal sexual conduct in the 2nd degree, paragraph (1) does *not* refer to assaults with intent to commit criminal sexual conduct in the 1st degree, but rather criminal sexual conduct "involving sexual penetration." The lack of parallelism was plainly purposeful. The use of "in the second degree" in paragraph (2) rather than "involving sexual contact," as would be parallel to paragraph (1), was required to avoid the

⁷ Slip opinion, at 2, fn. 2.

⁸ See e.g. *People v Snell*, 118 Mich App 750, 754-755 (1982), cited by the majority.

⁹ CJI2d 20.17.

absurd result that an assault with intent to commit criminal sexual conduct "involving sexual contact" would be a 5-year offense, while the completed offense of criminal sexual conduct in the 4th degree—which involves sexual contact—is a misdemeanor. To avoid this result, paragraph (2) had to be limited to assaults with the intent to commit criminal sexual conduct in the 2nd degree. But paragraph (1) is *not* limited only to assaults with the intent to commit criminal sexual conduct in the 1st degree, but to *all* assaults with intent to commit "sexual penetration." Case law—and the CJI2d instruction, requiring a showing of some "aggravating circumstance"—is in error.

Moreover, there is absolutely no requirement in paragraph (1) that the intended sexual penetration be for "an improper sexual purpose or intent," something not included in the CJI2d instruction. That language appears drawn from the criminal sexual conduct in the 2nd degree statute, and even that statute does not require a showing of an "improper sexual motive or intent," but that the contact could be "reasonably construed" as for the purpose of "sexual gratification or arousal."¹⁰ But the *only* elements of assault with intent to commit criminal sexual conduct involving penetration are 1)an assault, and 2)the intent to commit an act involving sexual penetration.

Because both prior case law and the CJI2d misdescribe the elements of assault with intent to commit criminal sexual conduct involving penetration, the analysis of the Court of Appeals in this case is mistaken. When the elements of assault with intent to commit criminal sexual conduct involving penetration are properly understood, then it also becomes clear that the offense is an included offense—as described in *Cornell*—of criminal sexual conduct in the 1st degree, charged under the theory of force or coercion/personal injury.

¹⁰ See MCL 750.520a(n)and compare MCL 750.520a(o), defining "sexual penetration" and containing no "reasonably construed for the purpose of sexual gratification or arousal" provision.

The elements of the particular form of criminal sexual conduct in the 1st degree charged here, which may be committed, under the statute, in *alternative* ways, are

- A sexual act, involving
- entry into the victim's mouth by the defendant's penis (that is, penetration);
- achieved by the use of force or coercion to commit the sexual act, meaning that the defendant "either used physical force or did something to make the victim reasonably afraid of present or future danger" (that is, an assault);
- and causing personal injury.¹¹

Though different terms are employed, "force or coercion" is an assault.¹² Criminal sexual conduct in the 1st degree as charged here is an assault, the accomplishment of sexual penetration, and the causing of personal injury. Assault with intent to commit criminal sexual conduct involving penetration is an assault, with the intent to achieve penetration but failing to do so. It is an included offense as that term is defined by *Cornell* of criminal sexual conduct in the 1st degree/force or coercion and personal injury.

¹¹ See CJI2d 20.1, as coupled with CJI2d 20.9.

¹² Recently the Court of Appeals held that a criminal sexual conduct in the 4th degree is an assault, where defendant had claimed his conviction for home invasion in the 1st degree could not stand because the statute requires the intent to commit or commission of a felony, larceny, or assault, and CSC 4 is not an assault: "Although the term 'assault' is not defined within the statute, our Supreme Court has previously defined this term. ...Michigan has defined the term 'assault' as 'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.' ...Furthermore, this Court has recognized that CSC crimes are actually a specialized or aggravated form of assault. ... Thus, the fact that the penalty and constituent elements of CSC crimes are codified in a different section than the 'general assault' crimes does not mean that CSC crimes do not constitute a specific type of assault. Accordingly, we hold that fourth-degree CSC constitutes an assault for the purposes of the home invasion statute, and therefore defendant's conviction for home invasion must be affirmed." *People v Musser*, 259 Mich App 215 (2003).

II.

An accused is entitled to fair notice to defend against charges. Even if assault with intent to commit criminal sexual conduct involving penetration is not a subset of the elements of CSC 1 as charged here, and even if *Cornell* is retroactive to instructions that were authorized by then-existing case law, the offense was, at the time of the trial, a cognate-included offense, and under the facts defendant received fair notice to defend so that no prejudicial error occurred.

A. Introduction

(1) The Problem

If assault with intent to commit criminal sexual conduct involving penetration is not an included offense of criminal sexual conduct in the 1st degree as charged in this case, then two questions remain: 1) is *Cornell*'s construction of the statute retroactive to cases where the instruction given was proper under the case law at the time, for if not, no error occurred; and 2) if *Cornell* is applicable to trials where a cognate-included instruction was given that was authorized by then-existing case law, is the error prejudicial? *Cornell*, of course, involved the construction of a statute,¹³ and overruled prior decisions.¹⁴ The retroactivity question is a somewhat daunting one,¹⁵ for two principal reasons:

¹³ MCL 768.32.

¹⁴ *People v Jones*, 395 Mich 379 (1975); *People v Chamblis*, 395 Mich 408 (1975); *People v Stephens*, 416 Mich 252 (1982); *People v Jenkins*, 395 Mich 440 (1975).

¹⁵ Though in *Cornell* itself the Court stated that its holding was applicable to cases pending on appeal with the issue preserved, it has also granted leave in another case, specifying that Parties "are directed to address the retroactivity of *People v. Cornell*, 466 Mich. 335, 646 N.W.2d 127 (2002)." *People v. Phillips*, 664 N.W.2d 223 (Mich. 2003).

- *Cornell* involves construction of a statute, and overrules prior decisions, but those decisions did *not* misconstrue the statute but simply ignored it. *Cornell* does not construe the statute differently than had previous decisions, but "plugs it back in," as it were. This court, then, did not in *Cornell* overrule a previous construction of the statute, but construed the statute *consistently* with prior decisions, requiring that this construction be followed and not ignored.
- Michigan has no comprehensive and coherent jurisprudence on retroactivity of overruling decisions.

The latter point is of long-standing concern. Several decades ago a justice of this court, Justice Blair Moody, Jr., remarked in an article that "...there has been inconsistency in both analysis and result in the Supreme Court of Michigan's application of its law-changing decisions." Justice Moody called for a "new and detailed look at both the factors which should enter into a retroactivity determination and the means by which this decision should be reached."¹⁶ Though he believed that it was "time for the Michigan high court to take a long look" at that jurisprudence,¹⁷ and it was his hope that his article would "provide a starting point for such reexamination and reanalysis,"¹⁸ that reexamination has not yet occurred.

The matter is extremely complex, for any comprehensive theory of retroactivity must account for the fact that overruling decisions are not all of one piece, in that the authority exercised by the judicial branch itself varies depending on the sort of case that is before the court. To oversimplify, the judiciary has rightful authority to:

¹⁶ Blair Moody, Jr., "Retroactive Application of Law-Changing Decisions in Michigan," 28 Wayne L Rev 439, 441 (1982).

¹⁷ Moody, at 509.

¹⁸ Id.

- interpret the common law in deciding cases;¹⁹
- promulgate and modify rules of practice and procedure, including procedural rules of evidence, independently of its authority to decide cases;
- interpret statutes in deciding cases; and
- interpret constitutional provisions in deciding cases.

And, on occasion, the judiciary exercises power beyond its authority.²⁰ Retroactivity principles may well differ depending on the sort of authority exercised by the court when it overrules a prior decision. But a comprehensive theory of retroactivity is beyond the scope of the argument here;²¹ the question here is the retroactivity of overruling decisions with regard to statutory interpretation or construction, and again, this court in *Cornell* simply required that the statute, as it had long been construed, be followed, rather than adopting an overruling construction of the statute.

(2) Defining Terms: The Four Faces of Retroactivity

That which makes an overruling decision retroactive is its application to conduct or events occurring *before* the decision;²² that which creates levels or degrees of retroactivity is that courts apply an overruling decision sometimes to no conduct or events occurring before the decision;

¹⁹ Constitution of 1963, Article 3, § 7: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force, until they expire by their own limitations, or are changed, amended or repealed." But see fn 28, *infra*.

²⁰ The distinction between power and authority was aptly described by Oscar Wilde: "If a rhinoceros were to enter this room, he would enter with great power; but I would be the first to rise to tell the beast he had no rightful authority in the premises."

²¹ The complex issues of retroactivity that arise as to overruling decisions with regard to common-law causes of action, for example, while pertinent to a comprehensive theory of retroactivity, are unnecessary to resolution of the question here.

²² See *James Beam Distilling Co. v Georgia*, *infra*.

sometimes to only that conduct or those events occurring before the decision litigated in the very case announcing the decision; sometimes to that conduct or those events occurring before the decision where an adjudication on direct review has not yet been completed (and the question has been properly raised); and sometimes to that conduct or those events occurring before the decision even when adjudication on direct review has been completed, allowing the judgment rendered to be attacked collaterally.²³

Both the cases and the literature in the field tend to use terms such as "prospective," "fully prospective," "partially prospective," "retroactive," and "fully retroactive" without precision, so that what is defined by some cases or commentators as "full retroactivity" is described by others as "partial retroactivity." One court has defined the terms in this manner:

- *Purely prospective*: a new rule or overruling decision is not applied even to the parties to the case in which the rule or overruling is announced, but applies only to future events;
- *Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, but to no others, including pending cases with the issue preserved, applying only, besides the parties, to future events.
- *Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved; and
- *Fully retroactive*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where

²³ One could view the question as one of the level of specificity, or, on the other hand, the level of generality, that application of the new rule is to have. See Shannon, "The Retroactive and Prospective Application of Judicial Decisions," 26 Harv J L & Pub. Pol'y 811, 812 (2003).

the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings.²⁴

Though the People believe that this description of what might be termed the "four faces of retroactivity" is both accurate and useful, some adjustment of the nomenclature is required; it is confusing to refer to one application of an overruling decision as "prospective" if there is also an application that is "purely prospective." If there is a greater degree of prospectivity than "prospective" then the lesser degree is more sensibly known as "partial prospectivity."²⁵ The differences in the opportunity for review between civil and criminal cases also require some adjustment. Once direct review is completed in a civil case, a collateral attack on the judgment is virtually impossible, save for fraud,²⁶ and thus to use the term "partially retroactive" to refer to those decisions applicable to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved, makes no sense in civil cases, for in civil cases this is "full" retroactivity. In criminal cases, collateral attack is more generally available through such mechanisms as state post-conviction proceedings—in Michigan, the motion for relief from judgment—and federal habeas corpus review, though the grounds for relief are far narrower than on direct review, as are the circumstances when a new rule or overruling decision applies. It is more sensible, in the People's view, to call overruling decisions that are applicable to

²⁴ *Blackwell v Commonwealth, State Ethics, Comm'n*, 589 A2d 1094, 1103 (PA, 1991) (Justice Zappala concurring); see also *PNC Bank v Workers' Compensation Appeal Board*, 831 A2d 1269, 1282-1283 (Commonwealth Ct, 2003).

²⁵ A rule of partial prospectivity is also necessarily one of partial retroactivity, applying to some conduct or events that occurred prior to the overruling decision, but in the scheme of things is more usefully referred to as partially prospective.

²⁶ See e.g. *Matter of Bulic*, 997 F2d 299 (CA 7, 1993); *Rogoski v Muskegon*, 107 Mich App. 730, 736, (1981).

the parties and to those cases pending on appeal where the issue has been preserved "fully retroactive," so to have a consistent terminology with civil and criminal cases, and to have a separate category of retroactivity for criminal cases where an overruling decision is applicable even on collateral attack. And indeed, federal decisions refer to this sort of retroactivity as "retroactive on collateral attack" or "retroactive to cases on collateral review."²⁷

The People will thus refer to the four faces of retroactivity with the following terminology:

- *Purely prospective*: a new rule or overruling decision is not even applied to the parties to the case in which the rule or overruling is announced, but applies only to future events;
- *Partially Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, but to no others, including pending cases with the issue preserved, applying only, besides the parties, to future events.
- *Fully Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved; and
- *Retroactive on Collateral Attack*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings.

B. Retroactivity and Statutory Construction

(1) A Brief History of Retroactivity in the Federal System

Whatever view one may take of retroactive application of decisions that overrule prior decisions with regard to the common law—and the matter is extremely complex, and not necessary

²⁷ See e.g. *Bottone v United States*, 350 F3d 59 (CA 2, 2003).

to decision here²⁸—that decisions construing statutes, even decisions overruling previous constructions of a statute, do no more than express what the law actually *is*, applying necessarily to

²⁸ This Court has quite clearly expressed the view that it has the authority to modify the common law in the civil arena, but at least as to common-law causes of action, as opposed to common-law evidentiary principles (the allocation of burdens of going forward and of persuasion, for example), the matter is open to question. The Northwest Ordinance of 1787 created a territorial government and provided that the inhabitants of the territory were entitled to “judicial proceedings according to the course of the common law.” When Michigan entered the Union it was understood that it would be absurd to require that all law of the state immediately be enacted by the new state legislature and governor, with all law predating statehood disappearing, and so the Constitution of 1835 provided that “All laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed *by the legislature*.” The common law was no longer simply “common law” or “judge made” law, it was made law by the constitution itself, and the authority for its change was given *solely* to the legislature, for unless it was altered or repealed by the legislature, it *continued*. The phraseology was changed in the Constitution of 1850: “The common law and the statute laws now in force” (in other words, “all laws now in force,” as said in the 1835 Constitution) “not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed *by the legislature*.” Change came in the 1908 Constitution: “The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are altered or repealed,” the three words “by the legislature” being deleted. Arguably, then, this revision of the constitution permitted alteration of the common law by the judiciary, but only if altering substantive law—causes of action—is within the judicial power, at least in a constitutional democracy. Though the Court has exercised this power, the intent of the framers and ratifiers of the 1908 Constitution makes this exercise of power at least questionable.

During the constitutional convention that drafted the 1908 Constitution the committee of the whole proposed to simply reenact section 1 of the schedule from the 1850 Constitution in precisely the same language. A motion was made to amend by striking out the last three words—“by the legislature”—for a *particular reason*: “I make this motion because it is presumed that a scheme of local self-government for cities and villages will be passed by this Convention, and the present charters of such cities and villages should be continued until they are repealed by action of the local municipality; so far as cities and villages are concerned such laws should be repealed by the municipality and not by the legislature. It seems to me that that being true these words should be stricken out, *so that it could not be construed that the particular charters should be repealed by the legislature*.” The purpose of the change, then, had nothing to do with enlarging the authority of the judiciary, but only in insuring that municipalities were free to repeal and reenact their own charters. See *Williams v City of Detroit*, 364 Mich 231, 241 (1961)(Justice Carr dissenting). But again, this Court’s authority with regard to common-law causes of action is not before the Court in this case.

events occurring before the overruling construction, was long the orthodox, if not the only, view. From the beginning of our constitutional democracy, it has been understood that it is "the province and duty of the judicial department to say what the law is,"²⁹ not what it shall be. And Chief Justice Marshall was simply expressing the commonly accepted Blackstonian understanding that when a "former determination is most evidently contrary to reason..." a decision setting that decision aside would "not pretend to make a new law, but to vindicate the old one from misrepresentation," the former decision not being declared bad law, but "that it was *not law*."³⁰ As stated by Justice Holmes, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."³¹ Though considering the effect of a statute that had intervened after a decision, Chief Justice Marshall's statement in *The Schooner Peggy*³² case was understood to apply also to intervening changes in a judicial construction of a statute:

If subsequent to [a] judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied....[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed,

²⁹ *Marbury v Madison*, 5 US (1 Cranch), 137, 177, 2 L Ed 60 (1803).

³⁰ 1 Blackstone, Commentaries, 69-70 (emphasis in the original).

³¹ *Kuhn v. Fairmont Coal Co.*, 215 US 349, 372, 30 S Ct 140, 148, 54 L Ed 228 (1910) (dissenting).

³² *The Schooner Peggy*, 5 US (1 Cranch) 103, 110 (1801).

but in violation of law, the judgment must be set aside.³³

The entire notion of retroactivity, then, is a "relative newcomer"³⁴ to American jurisprudence, the notion that an overruling construction of a statute (or other source of law) would *not* apply to actions that occurred before the overruling decision simply not existing. It was the sea change in constitutional jurisprudence worked by the Warren Court that virtually demanded limitation of the effects of that Court's many overruling decisions,³⁵ and thus consideration of a doctrine of retroactivity. In part because the purpose of the exclusionary rule is to deter unlawful police conduct, a purpose that cannot be served when the conduct condemned occurs before it is declared improper, the Court limited the reach of *Mapp v Ohio*³⁶ in *Linkletter v Walker*³⁷ regarding habeas proceedings, limited its reach on direct appeal in *Johnson v New Jersey*,³⁸ and continued on to limit

³³ As stated, courts understood that this principle applied to overruling judicial decisions as well, for the law—the statute—had pre-existed the overruling decision, and its correct meaning had to be applied in the case at hand: courts were required to "conform their orders to the...law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." *Vanderbark v Owens-Illinois Glass Co.*, 311 US 538, 542, 61 S Ct 347, 85 L Ed 327 (1941).

³⁴ Roosevelt, "A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity," 31 Conn L Rev 1075, 1082 (1999).

³⁵ "The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook." Philip B. Kurland, *Politics, the Constitution, and the Warren Court*, 90-91 (1970).

³⁶ *Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

³⁷ *Linkletter v. Walker*, 381 US 618, 85 S Ct 1731, 14 L Ed 2d 601 (1965).

³⁸ *Johnson v. New Jersey*, 384 US 719, 732, 86 S Ct 1772, 16 L Ed2d 882 (1966).

other new rules of criminal procedure to preclude their application to conduct occurring before the Court's overruling construction of the Constitution.³⁹

The test developed by the United States Supreme Court—since repudiated by that Court, but still followed in Michigan—applies three factors:

- the purpose of the new rule;
- the general reliance on the old rule; and
- the effect of retroactive application of the new rule on the administration of justice.⁴⁰

The concern that reliance on the old rule may well have created "settled expectations" is considered important in resolving the question of applicability of a new rule to cases already tried and to conduct which has already taken place.

But because a construction of a statute or constitutional provision, even one overruling prior precedent, is considered an expression of what the law "is," this three-prong retroactivity test has been abrogated by the United States Supreme Court in favor of Justice Harlan's view that these overruling decisions are applicable on direct appeal to the case before the court and all cases then pending on appeal with the issue preserved (what the People term "fully retroactive").⁴¹ As to decisions final at the time of the overruling decision, in the criminal arena, where collateral attack

³⁹ See discussion in *Griffin v. Kentucky*, 479 US 314, 321, 107 S Ct 708, 93 L Ed 2d 649 (1987).

⁴⁰ See *People v Sexton*, 458 Mich 43, 60-61 (1998). This is not to suggest that *Sexton*'s holding that the rule of *People v Bender*, 452 Mich 594 (1996) is to be applied only to that case and future cases is mistaken, as *Bender* itself raises a question of legitimacy. The 3-1-3 decision turns on Justice Brickley's concurring opinion, which creates a rule of criminal procedure without grounding it on any constitutional or statutory authority.

⁴¹ *Griffith v Kentucky*, 479 US 314, 322-23.

is possible, an overruling decision will be applicable on collateral attack only in very limited circumstances, the Court adopting, with some modification, Justice Harlan's view on this point as well. A new rule will be applied retroactively on collateral attack if it 1) places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or 2) announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding.⁴²

Civil retroactivity principles that closely approximated the *Linkletter* test were created in the *Chevron Oil*⁴³ case, and have also been laid to rest by the Court. In *James Beam Distilling v Georgia*,⁴⁴ the Court, through various opinions, considered "purely prospective" application of law-changing decisions. Justice Scalia wrote in his opinion that "purely prospective" opinions are outside of the "judicial power" confided in the judiciary by the Constitution, as the judicial power as historically understood is the "power to say what the law is" not the power to change it, so that when judges "make law" it is as "though they were 'finding' it."⁴⁵ Pure prospectivity is pure legislation. Justice Blackmun agreed that "failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication, and is outside of

⁴² *Teague v. Lane*, 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989).

⁴³ *Chevron Oil Co. v Huson*, 404 US 97, 92 S Ct 349, 30 L Ed2d 296 (1971).

⁴⁴ *James Beam Distilling v Georgia*, 501 US 529, 115 L Ed 2d 481, 111 S Ct 2439 (1991).

⁴⁵ See also Scalia, *A Matter of Interpretation* (Princeton University Press: 1997).

the Court's authority to 'decide only 'Cases' and "Controversies.'" "Unlike a legislature, we do not promulgate new rules to 'be applied prospectively only....'"⁴⁶

Later, in *Harper v Virginia Department of Taxation*,⁴⁷ the Court considered whether to apply its decision in *Davis v Michigan Department of Treasury*⁴⁸ retroactively. Through Justice Thomas, a majority made clear what was implicit in the multiple opinions in *Beam*:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

As stated by Justice Scalia concurring, "The true traditional view is that prospective decisionmaking is quite incompatible with the judicial power and that courts have no authority to engage in the practice." Indeed, historically "fully retroactive decisionmaking was considered a principal distinction between the judicial and legislative power."⁴⁹

⁴⁶ 115 L Ed 2d at 496.

⁴⁷ *Harper v Virginia Department of Taxation*, 509 US 86, 125 L Ed 2d 74, 113 S Ct 2510 (1993).

⁴⁸ *Davis v Michigan Department of Treasury*, 489 US 803, 103 L Ed 2d 891, 109 S Ct 1500 (1989).

⁴⁹ 113 S Ct at 2523. The Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*, 112 F3d 910 (CA 8, 1997) addressing questions of privilege in regard to subpoenas issued by the Office of Independent Counsel, considered whether it could resolve the questions involved without applying them in the very case before it. The court concluded it could *not*. Citing to recent United States Supreme Court cases on the point, the court stated that "purely prospective adjudication is at least unwise and *most likely beyond our power....*" In short, "a purely prospective decision is little more—perhaps nothing more—than an advisory opinion."

In sum, then, "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."⁵⁰

(2) Michigan Should Follow the Lead of the United States Supreme Court

Michigan jurisprudential history with regard to retroactivity follows much the same path as that taken in the federal system up to the point of *Linkletter*, but not beyond. Justice Cooley, quoting Chief Justice Marshall from *Wayman v Southard*,⁵¹ observed long ago that "'The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.'" Further, "to adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to *construe and apply the laws*, is the peculiar province of the judicial department." Distinguishing the construction of positive law from its creation, Justice Cooley wrote that

...those inquiries, deliberations, orders, and decrees, which are peculiar to such a department (the judicial department), must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former *decide upon the legality of claims and conduct*, and the latter *make rules* upon which, in connection with the constitution, *those decisions should be found*. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore,—to compare the claims of parties with the law of the land before established,—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in itself a legislative act....⁵²

⁵⁰ *Rivers v. Roadway Express, Inc.*, 511 US 298, 312-13, 114 S Ct. 1510, 128 L Ed 2d 274 (1994).

⁵¹ *Wayman v Southard*, 10 Wheat 46 (1824).

⁵² Cooley, p. 91-92 (emphasis added, final two instances of emphasis in the original). And see *Metzen v Department of Revenue*, 310 Mich 622, 629 (1945): "The effect of overruling a

While Michigan's adoption of and continued adherence⁵³ to the *Linkletter* "three-step" approach may protect settled expectations, it has the counter-effect of freeing the court from concern for the practical effect of overruling decisions, thereby removing an important restraint against legislating in the guise of deciding cases.

Indeed, this court has gone so far as to construe statutes and give that construction a purely prospective application, without any consideration as to whether in so doing it was failing to exercise judicial power, issuing an advisory opinion,⁵⁴ or rendering its decision completely *dicta*. For example, in *People v Lemmon*⁵⁵ the court construed MCL 770.1, which permits the granting of a new trial on the ground that "justice was not done." Overruling *People v Herbert*,⁵⁶ the court held that a trial judge may not grant a new trial by simply disagreeing with the credibility determinations of the jury; that is, by acting in effect as a "13th juror." But, although concluding that "[t]he reasons cited by the trial judge in the opinion before us are an inadequate basis for disturbing the jury's

decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision....The overruled decision remains the law of the case with respect to the particular case in which it was rendered."

⁵³ See e.g. *Pohutski v City of Allen Park*, 465 Mich 675 (2002); *Michigan Educ. Employees Mut. Ins. Co. v. Morris*, 460 Mich 180(1999); *People v Woods*, 416 Mich 581 (1982); *People v Hampton*, 384 Mich 669 (1971)(adopting *Linkletter*).

⁵⁴ The Michigan Supreme Court has explicit constitutional authority to issue advisory opinions. Const. 1963, Art. 3, § 8. That authority, however, is a special authority, not part of the judicial power, and can only be exercised upon request from the governor or either house of the legislature. Further, it may be exercised only as to the constitutionality of legislation after the legislation has been enacted but before it has gone into effect, which eliminates any question of retroactivity of the court's opinion.

⁵⁵ *People v Lemmon*, 456 Mich 625 (1998).

⁵⁶ *People v Herbert*, 444 Mich 456 (1993).

evaluations of credibility," the court nonetheless *affirmed* the grant of a new trial "because we find that the court did not err in ordering a new trial under the erroneous thirteenth juror standard previously permitted under *Herbert*." The court concluded, without any analysis, that "the newly adopted limitations on *Herbert* apply prospectively to cases not yet final as of the date of this decision."⁵⁷ This, the People submit, is inappropriate, for, as the United States Supreme Court said in *Rivers, supra*, "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Decisions—even overruling decisions—interpreting statutes should be fully retroactive, as the People have defined that term earlier.⁵⁸ This Court should follow the lead of the United States Supreme Court on the question of retroactivity principles.

C. Cornell and the Question of Remedies

In *Cornell* this Court stated that its decision "is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved."⁵⁹ As the People have defined it, this is full retroactivity—applicable in all cases except the exceptional

⁵⁷ *Lemmon*, at 647-648.

⁵⁸ For example, what the court termed limited retroactivity in *Lesner v. Liquid Disposal, Inc.*, 466 Mich 95, 109 (2002) – "For these reasons, we hold that the present opinion is to be given only limited retroactive effect. The interpretation of M.C.L. § 418.321 articulated in this opinion is to be applied only to the present case; to other cases pending decision by a worker's compensation magistrate or on appeal, to either the WCAC or the Court of Appeals, in which the determination of the level of benefits to be paid a partial dependent is in issue; and to future cases in which the level of benefits due a partial dependent under M.C.L. § 418.321 needs to be initially determined"—the People submit is full retroactivity, as final civil judgments are not subject to collateral attack as are final judgments in criminal cases.

⁵⁹ *Cornell*, at 367.

category for criminal cases of retroactivity on collateral attack. And it is the principle adopted by the United States Supreme Court, and urged by many commentators.⁶⁰

The People may seem to be arguing against themselves: if assault with intent to commit criminal sexual conduct involving penetration is, contrary to the People's first argument, found not to be an included offense of criminal sexual conduct in the 1st degree committed by force and coercion and personal injury, and if *Cornell* is to be applied to instructions given before the date of that decision—that is retroactively, retroactive meaning applicable to conduct occurring before the decision—is not reversal then required? Not necessarily, for from the conclusion that a rule of law, such as a statute as newly interpreted—or, as here, as directed be applied—is applicable in a given case, so that it follows that error occurred, it does not ineluctably follow that the error is *prejudicial*, under accepted standards of harmless error review.

Indeed, a number of commentators advocating that overruling judicial decisions be fully retroactive (that is, applicable to conduct occurring before the overruling decision by being applicable to cases pending on direct appeal with the issue preserved) recognize that the question of remedy is a separate question from the question of error, and that doctrines such as equitable tolling and harmless error may well be applicable in individual cases.⁶¹ And here the purpose of both the law construed—here the statute—and the purpose of the remedy for violation of the law, have a role to play. As Professor Roosevelt notes:

⁶⁰ See e.g. Roosevelt, "A Little Theory Is A Dangerous Thing: The Myth Of Adjudicative Retroactivity," *supra*, and Shannon, "The Retroactive and Prospective Application of Judicial Decisions," 26 Harv Jnl of Law and Pub Policy 811 (2003).

⁶¹ See e.g. Roosevelt, fn 59, at 1108, 1131-1137.

[W]here the purpose of a new rule is deterrent, as the Court's Fourth Amendment innovations have been, an individual defendant has little grounds on which to complain if the exclusionary rule is withheld in his case. Given that the exclusionary rule is a judicially created remedy rather than a substantive individual right, reviewing courts should have some latitude in withholding it where new rules are at issue. Rules creating procedural rights that do belong to defendants, rather than to society, would by contrast demand remedies on direct review.⁶²

What purpose, then, does MCL 768.32(1) serve?

The statute serves two principal functions: it protects the right of the accused to fair notice of the charges against him, and it protects the prosecutor's charging function from intrusion, serving the interest of the separation of powers between branches of government.⁶³ When an instruction is given on an offense not included within the greater offense, in the manner defined by *Cornell*, the court has amended the information to add an alternative count not charged by the People, and this interferes with the People's charging authority. And depending on the degree of relationship or overlap of elements of the two offenses, the defendant may be denied fair notice to defend against the added charge.⁶⁴ Any interference with the prosecutor's charging authority is for the prosecutor to defend, and here not only was no objection made, but the prosecutor sought the instruction. Did instruction on assault with intent to commit criminal sexual conduct involving penetration deny

⁶² Roosevelt, at 1132.

⁶³ See e.g. *People v Birks*, 960 P2d 1073 (CA, 1998); *Schmuck v United States*, 489 US 705, 109 S Ct 1443, 103 L Ed2d 734 (1989); *Jess v State*, 523 So 2d 1268, 1269 (Fla Ct App, 1988)("A defendant has no right to be charged or tried as to any particular offense, the right to charge or not charge a defendant with a particular crime...belongs to the State's attorney");

⁶⁴ This concern was raised by the Supreme Court in *Schmuck* as a good reason to reject a "cognate" approach to included offenses; the Court did *not* hold, however, that instruction on any offense that is not a subset of the elements of the greater offense denies fair notice so as to violate defendant's right to fair trial.

defendant fair notice, assuming, for the sake of argument only, that it is not a subset of the elements of criminal sexual conduct in the 1st degree by way of force and coercion and personal injury?

It did not. At the time of defendant's trial, assault with intent to commit criminal sexual conduct involving penetration had been held to be a cognate-included offense of criminal sexual conduct in the 1st degree,⁶⁵ and, again, even if not a subset of the elements of the greater offense, readily fit within the established requirements for a cognate offense. Under the law at the time, the defendant was aware both that instructions on cognate-included offenses were possible and that assault with intent to commit criminal sexual conduct involving penetration was—at the least—a cognate-included offense of criminal sexual conduct in the 1st degree. He was thus not denied fair notice, and the instruction in this case was harmless error, not affecting any substantial right.⁶⁶

This is not to say that in a future trial instruction on what had been recognized as a cognate-included offense of a greater offense will necessarily be harmless error, where defendant preserves the issue. Just as the defendant in this case was on notice given the law existing at the time of the trial, a defendant in a post-*Cornell* trial has a legitimate expectation that he need *not* defend against offenses that are not subsets of the elements of the greater offense, for he may justifiably rely on *Cornell* for the proposition that cognate-included offense caselaw has been abrogated. Thus relief might quite appropriately be granted a post-*Cornell* defendant where it is denied to a pre-*Cornell*

⁶⁵ See e.g. *People v Draper*, 150 Mich App 481 (1986).

⁶⁶ An example of a denial of fair notice, *precluding* a remedy, is when an appellate court overrules a prior decision defining the substantive criminal law in a manner that is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” The prosecution may not obtain the “remedy” of an instruction on the law as it is then defined, applicable to conduct occurring before the decision, for that remedy would deny fair notice to the accused. See e.g. *Bouie v City of Columbia*, 378 US 347, 84 S Ct 1697, 12 L Ed 2d 894 (1964).

because of the one was on notice, while the other was not. This is a case where fair notice existed before *Cornell*, but at least arguably would not after *Cornell*, as to instruction on "cognate" offenses.⁶⁷

D. Conclusion

Assault with intent to commit criminal sexual conduct involving penetration is an included offense of criminal sexual conduct in the 1st degree, by way of force and coercion and personal injury. If it is not, then *Cornell* compels the conclusion that error occurred in this case, but that error was harmless—the defendant cannot shoulder his burden of demonstrating that it is more likely than not that a substantial right has been compromised, working a miscarriage of justice—because, given

⁶⁷ One commentator has suggested that application of the law of remedies so as to deny relief under a retroactive decision may be precluded by *Reynoldsville Casket Co. v Hyde*, 514 US 749, 115 S Ct 1745, 1748, 131 L Ed 2d 820 (1995). But there the Supreme Court explained that "retroactivity does not always dictate the same remedy (or result) in the second case, as when a court finds: 1) *an alternative way of curing the constitutional violation*, or 2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or 3) ... a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or 4) a principle of law, such as that of "finality" present in the *Teague* context, that limits the principle of retroactivity itself." *Federal Election Com'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (C.A.D.C.,1996). For example, a retroactive new rule of constitutional procedure will not result in a remedy in a tort suit, for a governmental official has qualified immunity for actions taken before the new rule was announced (it would make much sense not to apply the exclusionary rule to situations where, as a matter of tort law, qualified immunity would exist). In this circumstance, "a well-established general legal rule [qualified immunity]... trumps the new rule of law...." *Hulin v Fibreboard Corp.*, 178 F3d 316, 333 (C.5,1999). The nature of the right in *Reynoldsville* required that a remedy be applied to all cases, for involved was a holding that a state statute, which applied to claims against out-of-state defendants, placed an unconstitutional burden upon interstate commerce. Here, a well-established general legal rule—harmless error—"trumps" the overruling decision as to remedy where the purpose of the statute—fair notice—has been served in the case in question by the decisions which are now longer operative.

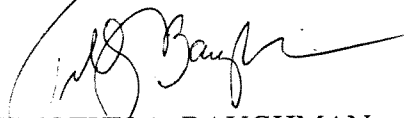
law existing at the time of the trial, defendant was not denied fair notice to defend against the offense. The conviction should be affirmed.

Relief

WHEREFORE, the People respectfully requests this Honorable Court to grant leave to appeal.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
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A handwritten signature in black ink, appearing to read 'Timothy A. Baughman', written over a horizontal line.

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